

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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77-6147

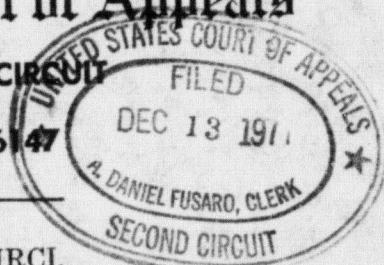
To be argued by
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6147



ALFRED A. CURCI,

Appellant,

—against—

THE UNITED STATES OF AMERICA, THE JUDGE
ADVOCATE GENERAL OF THE ARMY, and THE
SECRETARY OF THE ARMY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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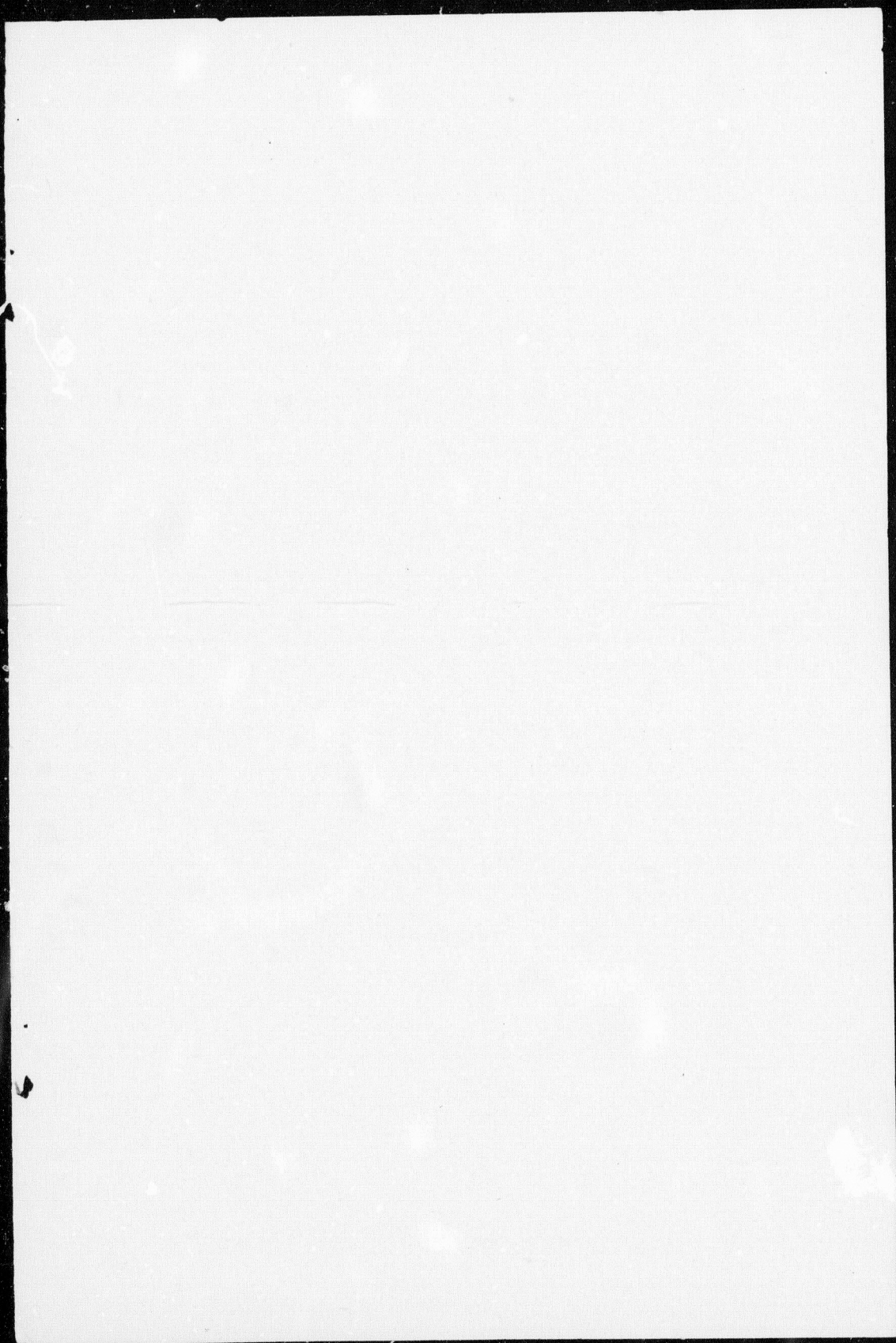


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GENERAL OF THE ARMY, and THE SECRETARY OF THE
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Appellees.

BRIEF FOR THE APPELLEES

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York, entered August 1, 1977 (Mishler, *Ch. J.*), dismissing Curci's complaint upon findings that the treatment afforded his Article 69 petition by the office of the Judge Advocate General was appropriate to the circumstances and that Curci had failed to establish that his court-martial defense counsel was prejudicially ineffective.

Statement of Facts

On February 19, 1948, plaintiff-appellant Alfred A. Curci was tried before a general court-martial at Fort

Dix, New Jersey, for the offense of desertion (24a).¹ Specifically, Curci was charged by the authorities with violation of the 58th Article of War, in that he allegedly (28a)

...did at Fort Dix, New Jersey on or about 24 December 1946, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Dix, New Jersey on or about 14 October 1947.

Prior to the trial, the prosecution indicated its intention to prove this charge by way of documentary evidence, including extracts of morning reports, which would corroborate Curci's desertion from the Army in December, 1946 and his subsequent surrender to military control in October, 1947 (33a, 37a). However, the first such extract offered into evidence—a morning report noting Curci's initial absence from his battalion on December 24, 1946—was found to be "in error", since it was dated December 28, 1947. Accordingly, the trial judge advocate requested a recess, which was granted by the court. Several minutes later, the prosecution presented to the court a stipulation between the trial judge advocate, defense counsel and Curci, asserting that the latter "went absent without leave from Company E, 43rd Training Battalion, Ground Force Replacement Center, Fort Dix, New Jersey, on or about 24 December 1946" (52a).

Before accepting this stipulation, the law member asked Curci (1) whether he understood the trial judge advocate's statement and (2) whether he understood that he need not agree to the statement, and that if he did not, it would be necessary for the prosecution to come forward with other proof. Curci responded in the af-

¹ Numbers in parentheses refer to the pages of the Appendix filed by appellant with this Court. Numbers preceded by "Br." refer to pages in Appellant's Brief.

firmative to both questions and the stipulation was received in evidence (52a-53a). The prosecution rested after offering in evidence an extract of the morning report dated October 28, 1947, which detailed Curci's return to military control as of October 14, 1947 (53a, 68a).

The law member then fully advised Curci of his right to do one of three things (53a-54a):

First you may be sworn and take the stand as a witness. If you do that, whatever you say will be considered and weighed as evidence by the court just like the testimony of other witnesses, and you can be cross-examined on your testimony by the trial judge advocate and the court.

Second, if you do not want to testify under oath you may, without being sworn, say anything you desire to the court as an unsworn statement, denying, explaining, or excusing any of the acts charged against you here. This statement can be oral or written, and can be made either by yourself, by your counsel, or by both of you. Since such a statement is not given under oath, and since you cannot be cross-examined upon it, it cannot be given the same weight by the court as sworn testimony, but it will be considered by the court and given such weight as it may seem to deserve.

Third, you may remain silent, that is, say nothing at all. You have a perfect right to do this if you wish, and if you do so the fact that you do not take the witness stand yourself, or make any statement, will not count against you in any way with the court. It will not be considered as an admission that you are guilty, nor can it be commented on in any way by the trial judge advocate in addressing the court.

After conferring with defense counsel, Curci chose to be sworn as a witness (54a). He admitted to absenting himself without leave on December 24, 1946 (61a), but argued that he did so because of fear of an operation which he had been told would have to be performed on his right testicle. Appellant explained (55a-56a):

Well, sir, ever since I came in the service, I have been pretty sick. I go to sick call quite often because of a bad testicle I have, and when I did go to sick call they told me I would have to have an operation performed on the right testicle. Upon hearing this, I got very nervous and I started to worry as soon as I heard this, and I kept going back to sick call asking the captain there if there was any other way I could have this taken care of without an operation and the captain told me that was the only way I could feel better if I had this operation performed, and I was told that if I did not get the operation that I would be court-martialed. Upon hearing this and being very frightened about getting this operation and having them cut open my testicle and operate on me, I went AWOL, sir.

Curci further testified that while fear of an operation was the primary reason for his remaining absent from service for over ten months, a secondary reason was that his mother was ill, and having him at home with her was a comfort to her. Her illness had commenced after the death of appellant's father, to whom she was very attached (58a, 60a).

Following Curci's testimony, stipulations were entered into with the prosecution as to what three defense witnesses would say if present. All of the stipulated testimony concerned the health and dependency of Curci's mother (63a-64a). No further witnesses were called on either side.

Following the presentation of evidence, defense counsel made a closing argument on behalf of his client. The prosecution waived its right to argue, and the court closed to take a secret vote on the charge and specification (64a-65a).

The vote resulted in a finding of guilty on both the charge and the specification of the charge. Curci was thereupon sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for one and one-half years (65a-66a).

On March 24, 1948, the staff judge advocate submitted a review of the case to the commanding officer of the 9th Infantry Division (29a-32a). In his report, the staff judge advocate recounted the evidence presented at the court-martial and commented as well on appellant's military record and civilian background. He opined that Curci's initial absence was not proved by evidence, documentary or otherwise, submitted by the prosecution but rather, was established by stipulation between the parties. Since the stipulation made out a *prima facie* case of absence without leave and supplied the proof thereof, the staff judge advocate stated that it would have been better practice for the law member "to have enlarged upon the effect of the stipulation to the end that the accused would fully appreciate the legal scope of the stipulation" (30a). However, since Curci voluntarily testified and admitted the unauthorized absence under oath, the staff judge advocate concluded that "it may not be said that the stipulation was improvident or prejudicial" (32a).

The staff judge advocate then proceeded to consider the evidence and the charge. He found that although Curci's absence was lengthy, there was insufficient proof of his intent to desert inasmuch as appellant testified that he intended to return to the military when he overcame his fear of the proposed operation, and that Curci

did ultimately voluntarily surrender to military control. The staff judge advocate noted further that the fact that Curci did not pursue gainful employment while absent, in conjunction with his testimony and surrender, tended to negative the intent to desert. Therefore, the staff judge advocate concluded (31a):

It follows that the accused should have been found guilty of the lesser included offense of absence without leave for the period alleged in violation of the 61st Article of War, and that the sentence adjudged therefor should have been, at most, that authorized by the Table of Maximum Punishments, to wit: dishonorable discharge, total forfeitures, and confinement at hard labor for six months.

This recommendation was approved by the commanding officer, 9th Infantry Division, on March 25, 1948 (67a).

Curci served his sentence, and several years thereafter, first applied to the United States Army Board for Correction of Military Records for relief from the judgment of the court-martial. This first application, made in 1953, was denied because the Board found no basis for a reasonable doubt as to guilt, nor any indication of probable error or injustice in the trial or sentence (6a, 11a, 15a-16a). A subsequent application made in 1965 was rejected, as was a third application in 1971, because the Board found no new evidence of error. However, the Board did note, in rejecting Curci's 1971 application, that under the recently amended provisions of Article 69, U.S.M.J., 10 U.S.C. § 869, appellant had the right to petition the Judge Advocate General for a review of his original conviction (16a).

Four years later, Curci perfected such an application, alleging that he was denied the effective assistance of counsel at his court-martial. Complaining that his de-

fense counsel, an officer admitted to the military bar, was not an attorney, Curci contended that he was "improperly" advised to take the stand, that counsel "foolishly" stipulated to the elements of the charge, and that counsel failed to raise the "viable" defenses of duress and insanity (16a).

In denying this application for failure to set forth a sufficient basis for relief under any of the four grounds set forth in Article 69 of the Uniform Code of Military Justice, the office of the Judge Advocate General informed Curci that it had examined the request for relief, the original record of trial, appellant's brief, and other matters presented. The office of the Judge Advocate General concluded (69a):

Your main contention—inadequacy of representation—was analyzed and reviewed carefully. It was concluded, however, that the representation by the non-lawyer defense counsel was not prejudicially inadequate. More than likely, his agreement to stipulate to the period of "AWOL" was based on the theory that an admissible morning report entry was obtainable by the prosecution. It is to be noted, of course, that the accused's trial testimony and the lack of the prosecution's evidence as to the required intent caused the approval of only the lesser included offense of "AWOL".

Curci commenced the instant action in the court below on April 30, 1976, alleging (1) that his Article 69 petition had been treated more as a "prayer for clemency than as an appeal from a conviction addressed to a judicial body", and (2) that his court-martial "was attended by jurisdictional and constitutional errors" (6a, 8a). His complaint was dismissed by decision dated July 29, 1977 (1a, 13a-23a).

Relevant Statute

10 U.S.C. § 869:

Art. 69. Review in the office of the Judge Advocate General

Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by section 866 of this title (article 66), shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with section 866 of this title (article 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)). Notwithstanding section 876 of this title (article 76), the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.

Aug. 10, 1956, c. 1041, 70A Stat. 61; Oct. 24, 1968, Pub. L. 90-632, § 2(30), 82 Stat. 1342.

Opinion Below

Citing the Congressional Record, the court below described Article 69 as creating a collateral proceeding akin to *coram nobis* (18a-19a):

The relief that may be awarded is both extraordinary and discretionary in nature. DA Pam 27-2, *Analysis of Contents, Manual for Courts Martial*, *supra* at 21-1-2. Nevertheless, legal principles control. See *McPhail v. United States*, 24 U.S.C.M.A. 304, 52 C.M.R. 15 (August 27, 1976). * * *

This does not mean however that petitioners are entitled to extended treatment of their claims. While whimsical or capricious decision-making ought play no part in this scheme, there is a place, and often a need, for abbreviated procedures. Short form opinions, even in contested matters, are appropriate given the enormous case load generated by convicted personnel.

The court thereupon concluded that the summary treatment of Curci's petition was entirely proper and that as to his alternative claim for relief in the nature of habeas corpus, that the ultimate conclusion reached on the petition was correct inasmuch as Curci had not established prejudicially ineffective representation (20a-23a).

ARGUMENT

POINT I

The district court correctly found that Curci's Article 69 petition received appropriate treatment from the office of the Judge Advocate General and that his 1948 court-martial did not suffer constitutional infirmity.

Curci contends on this appeal that his Article 69 petition to the office of the Judge Advocate General, alleging that he was inadequately represented by appointed counsel at a 1948 court-martial, was arbitrarily and

capriciously handled by that office and that his right to appeal his conviction under 10 U.S.C. § 869 was thereby improperly abridged.² For the reasons stated below, it is clear that Judge Mishler's order denying Curci's motion for summary judgment was eminently correct and should not be disturbed by this Court on appeal.

A. Appellant's Article 69 petition received appropriate treatment from the Judge Advocate General.

Curci claims that administrative review of his 1948 court-martial conviction, in accordance with the procedures announced in the 1968 amendment to Article 69 of the Military Justice Act, was meaningless because the Judge Advocate General's office, in summarily denying the requested relief, treated his petition "more as a prayer for clemency than as an appeal from a conviction addressed to a judicial tribunal" (5a). The arguments advanced in support of this contention, however, misconceive the nature of the relief afforded by the amended Article 69.

First, in urging that his constitutional claim received short shrift from the Judge Advocate General's office, Curci wrongly characterizes the standard to be applied in post-review proceedings as "identical to the standard that prevails in every direct criminal appeal, civilian or military." (Br. at 27). In fact, the authorities are clear that Article 69 of the Uniform Code of Military Justice, as expanded by the Military Justice Act of 1968, makes available only collateral, "quasi-appellate" relief for cases that would otherwise be reviewed only in the field. Moyer, *Justice and the Military*, § 2-766 at 619.

² Jurisdiction is premised under 28 U.S.C. § 1361. See *Williams v. Froehlke*, 490 F.2d 998, 1000 n.2 (2d Cir. 1974), where this Court noted that the Supreme Court had assumed jurisdiction in a similar case, *Warner v. Flemings*, 413 U.S. 665 (1973), by deciding it on the merits.

As implemented by the Manual for Courts-Martial, relief under [the amended] Article 69 is clearly not to be regarded as part of the appellate review process. It is a post-review remedy more in the nature of extraordinary relief, a discretionary power of relief in the hands of the Judge Advocate General. See DA Pam 27-2, *Analysis of Contents, Manual for Courts-Martial*, 1969 (Rev.) 21-22 (28 July 1970). *Id.* at 620.³

While legal principles control such claims, see *McPhail v. United States*, 24 U.S.C.M.A. 304, 52 C.M.R. 15 (1976), there is no requirement that a Judge Advocate General give extended treatment to each petition he reviews.

Curci's second argument—that the Judge Advocate General's office should have issued a written opinion explaining the reasons for its rejection of appellant's constitutional claims—is likewise without merit. For the instant record makes plain that, in reviewing Curci's petition, the Judge Advocate General examined and considered (1) the request for relief, (2) the original record of trial, (3) appellant's brief, and (4) additional unenumerated matters which were presented to it (69a). Indeed, the letter which accompanied denial of his application specifically informed Curci that “[y]our main contention—inadequacy of representation was analyzed and reviewed carefully” and detailed several reasons in support of the Judge Advocate General's conclusion that “the representation by the non-lawyer defense counsel was not prejudicially inadequate.” Although it is true that each claim was not treated individually in writing, it does not thereby follow, as Curci urges, that the administrative review was improper or failed to take account of controlling legal precedents. Rather, since the Judge Advocate General's office is a branch of the Department of

³ There is apparently no time bar to appellant's suit. See Moyer, *supra* at 619-20.

the Army, the procedures it employed in processing appellant's case are entitled to the presumption of regularity normally afforded agency action.

In *United States v. Hurt*, 9 U.S.C.M.A. 735, 27 C.M.R. 3, 24 (1958) the United States Court of Military Appeals stated with respect to a decision by a board of review:

Certainly it is preferable procedure for a board of review to indicate clearly the reasons for its action, especially when there are assignments of error which relate to material aspects of the trial. . . . But nothing in the Manual or the Uniform Rules of the boards of review requires a statement of reasons. Necessarily, the scope and length of an opinion in a particular case rests in the sound discretion of the judicial body. We find no error in this action by the board of review. [Citations omitted].

See also *United States v. Keenan*, 18 U.S.C.M.A. 108, 39 C.M.R. 108 (1969).

It is thus plain that in the instant case, the district court correctly found that (19a):

Short form opinions, even in contested matters, are appropriate given the enormous caseload generated by convicted personnel. The Judge Advocates General, may, as do the Courts of Military Review, render decisions in complex matters without enumerating their reasons or responding to claims of error.

Accordingly, because the record reveals no support for Curci's claim that his Article 69 petition was decided in a manner inconsistent with military precedent, there is no basis for remanding this case to the office of the Judge Advocate General for further action.

B. Curci was adequately represented by counsel at the court-martial.

Curci urges that he was ineffectively served by his non-lawyer military defense counsel during the course of a 1948 court-martial charging him with desertion. Examination of the record—although rendered difficult by the passage of 30 years—demonstrates that his claim of deficient representation is groundless.

At the outset, it should be noted that Curci bears a very heavy burden in demonstrating to this Court that his trial counsel was ineffective. In *Williams v. Froehlke*, 356 F.Supp. 591, 594 (S.D.N.Y. 1973), *aff'd, supra*, 490 F.2d 998, a case involving claimed ineffective assistance of both military and civilian counsel at a court-martial, the court stated:

The standard to be applied is the stringent one enunciated in habeas corpus cases, requiring Williams to show 'that "the purported representation by counsel was such as to make the trial a farce and a mockery of justice", representation that is so deficient as to "shock the conscience of the Court". *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586 (1950).' *United States ex rel. Crispin v. Mancusi*, 448 F.2d 233, 237 (2d Cir.), *cert. denied*, 404 U.S. 969, 92 S. Ct. 346, 30 L.Ed. 2d 288 (1971).

Curci contends, however, that this "stringent" standard, which was recently reaffirmed by the court in *Rickenbacker v. Warden, Auburn Correctional Facility*, 550 F.2d 62 (2d Cir. 1976), *cert. denied*, — U.S. —, 98 S. Ct. 103 (1977), should not apply in evaluating the performance of his military counsel, who was a non-lawyer. The case establish that, for purposes of appellate review, this purported distinction between lay and professional counsel must fail, for it has been the consistent position of the courts that representation by non-lawyer defense counsel

is not *per se* unconstitutional. *Harris v. Ciccone*, 417 F. 2d 479 (8th Cir., 1969), *cert. denied*, 397 U.S. 1078 (1970); *Smith v. McNamara*, 395 F.2d 896 (10th Cir., 1968), *cert. denied*, 394 U.S. 934 (1969); *Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir., 1971); *Angle v Laird*, 429 F. 2d 892 (10th Cir., 1970); *Kennedy v. Commandant, U.S. Disciplinary Barracks*, 377 F.2d 399 (10th Cir., 1967). Similarly, *Williams v. Froehlke*, *supra*, 356 F. Supp. at 594, suggests that military counsel are presumed to be as competent as their civilian counterparts.

Moreover, it should be emphasized that Curci's court-martial took place in 1948, prior to the enactment of the Uniform Code of Military Justice. At that time, representation by non-lawyer military counsel was accepted procedure in courts-martial. Indeed, in most cases, the prosecutor was likewise without formal legal training. *See generally, Ervin, The Military Justice Act of 1968*, DA Pam 27-100-45 (July, 1969), p. 77 and the articles cited in fn. 3. It is interesting to note that in the instant case, defense counsel held the rank of captain, whereas the prosecutor was a first lieutenant (48a). Arguably, the defense counsel outpointed the prosecutor in terms of the experience each brought to this trial. Furthermore, Curci stated that he desired to be defended by the regularly appointed defense counsel and that he "did not object to continuing with trial in the absence of the other defense counsels" (49a).

In an effort to establish special circumstances, and to come within the stringent standard to be applied with respect to allegations of ineffective assistance of counsel, Curci maintains on appeal that his military counsel committed "three egregious blunders" which rendered his representation constitutionally infirm (Br. at 12-14)⁴

⁴ Arguably, the Sixth Amendment is totally inapplicable to court-martial proceedings. *Mittendorf v. Henry*, 425 U.S. 25, 33-34 (1976). However, since an accused might be subjected to loss of liberty or property, a Fifth Amendment due process issue might still be raised. *Id.* at 43.

The first alleged error is that counsel stipulated to the fact that Curci went absent without leave on December 24, 1946. The record reveals that this stipulation was entered into between the prosecutor, defense counsel, and Curci following a recess which undoubtedly included a discussion between Curci and his counsel (52a). In its decision on Curci's Article 69 petition, the office of the Judge Advocate General suggested that the defense might have stipulated to the AWOL upon learning that an admissible morning report could be obtained (69a). Also addressing this point, the district court noted that in all probability, base personnel or Curci's commanding officer could likewise have corroborated his absence (21a). While appellant complains bitterly that these suggested justifications for counsel's conduct are merely speculative (Br. at 10, 12-13 fn. 7), they are surely no more implausible than Curci's own surmise that the defense was persuaded to give up everything in return for nothing. As Judge Latimer recognized in his dissenting opinion in *United States v. Gardner*, 9 U.S.C.M.A. 48, 25 C.R.M. 310, 314 (1958), "[W]hen this Court enters the field of inadequate representation without knowing the facts which motivate trial defense counsel, the whole area becomes conjectural." While AWOL is generally proven by appropriate official entries, the suggestion of the district court that live testimony could have provided the prosecution's proof is certainly not at odds with what would be standard procedure in establishing a *prima facie* case of AWOL. See Byrne, *Military Law* (2d Ed. United States Naval Institute, 1976), p. 128.

Moreover, Curci's contention that there was no strategic reason prompting the stipulation can be refuted by inferences in the record at least as strong as those Curci himself draws in support of his claim. For instance, it should be noted that the "improvident" stipulation tended only to prove the offense of AWOL. This Court

should not lose sight of the fact that Curci was on trial for desertion, a far more serious charge. Curci testified and painted a sympathetic picture of himself as a man with no intent to desert. His counsel summed up for the court, undoubtedly urging them at the very least to weigh Curci's unrefuted testimony heavily in his favor; and it was this unrefuted testimony which resulted in the ultimate lowering of the offense to AWOL from desertion by the staff judge advocate.

It could very well have been the case that with other evidence available to the prosecution, Curci's conviction of desertion appeared a certainty. Thus counsel may have determined that Curci's best chance was to "get off" with a conviction for simple AWOL; and if the chances of achieving this were reliant upon Curci's testimony remaining unassailed, would not the stipulation in return for the prosecution's waiver of a closing statement be an effective strategy? For in an unusual departure from standard trial practice, the record herein reveals that the prosecution made no closing argument (64a). Surely the protracted nature of Curci's absence was a subject ripe for comment where the intention to desert was at issue. Hence, that Curci may have received a return for his stipulation can certainly be hypothesized with as much support from the record as the proposition that he gave up all in return for naught.

The second claimed error is that counsel "prevailed upon" Curci to take the stand and thereby waive his right to avoid self-incrimination. Appellant alleges this as error since Curci's judicial confession of the AWOL convinced the staff judge advocate that the stipulation was not improvident or prejudicial (30a). First, it must be noted that Curci was informed by the court that he need not enter into the stipulation, and that the prosecution would have to offer additional proof if he did not (52a). Likewise, Curci received a thorough instruction on his right

to remain silent and the alternatives available to him in choosing whether or not to testify (53a). That Curci understood how to exercise his rights, should he have so desired, is clear from the record.

For example, in the investigation report prepared prior to the court-martial, it was noted that Curci (who did not desire counsel to be present at the investigation), upon being advised of his rights under the 24th Article of War, chose to remain silent (37a). Certainly one who had exercised his right to remain silent during a pre-trial proceeding would not be unaware of the significance of the right to remain silent at the trial itself. Whether or not the decision to testify emanated originally from Curci or his counsel cannot be ascertained from the record; however, it is clear that Curci was not unfamiliar with the exercise of his rights.

The third "egregious blunder" which appellant calls to the attention of this Court is defense counsel's alleged failure to argue the complete affirmative defense of duress. First, Curci concedes that defense counsel's closing argument was not transcribed, and that he cannot say for a fact what was or was not argued to the court (Br. at 14 fn. 10). He rests his argument upon the claim that "counsel's general performance makes it much more likely than not that he did not appreciate the significance of the testimony adduced", and cites as examples of this "general performance", the fact that counsel "exercised no challenges, made no motions, offered no objections" throughout trial, and "sat by silently while the court *sua sponte* refused to receive the irregular morning report in evidence". *Id.* Surely Curci does not contend that counsel should have interrupted the court as it refused to accept the tendered morning report. Moreover, as the entire prosecution case consisted ultimately of the stipulation and one other morning report, the necessity for asserting challenges, motions, or objections "throughout the trial" is not apparent from the record.

However, even if what Curci surmises is correct, *i.e.* that counsel never argued for an acquittal based upon the defense of duress, the law is clear that such a defense would not be applicable to the circumstances of his unauthorized departure and therefore, counsel's failure to propound such an argument can hardly be faulted, much less deemed an "egregious blunder".

For in the criminal law, to constitute a defense:

[T]he coercion or duress must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done.* * * Furthermore, the danger must be continuous throughout the time when the act is being committed and must be one from which the defendant cannot withdraw in safety. 21 Am Jur 2d, Criminal Law ¶ 100.

This definition has been adopted by the body of military cases involving the duress defense. See *United States v. Pinkston*, 18 U.S.C.M.A. 261, 39 C.M.R. 261, 262 (1969); *United States v. Fleming*, 7 U.S.C.M.A. 543, 558, 23 C.M.R. 7, 22 (1957); *United States v. Olsen*, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957); Winthrop, *Military Law and Precedents* (2d Ed. War Dept., 1920), p. 635. See also, *Manual for Courts-Martial* (1969) ¶ 216f, and A. Avins, *The Law of AWOL* (1957) at p. 147, where it is stated that a duress defense "extends only to *bona fide* cases of really harsh treatment on the part of the accused's associates or superiors".

In the instant case, there is no cause to doubt Curci's sincere apprehension of the proposed operation on his testicle. However, there is nothing in the evidence to suggest that the threatened operation was of such imminency as to justify a duress defense. Curci testified that he had gone to sick call "quite often" and that on those occasions he was told that he would have to have an

operation (55a). His nervousness over this prospect caused him to keep going back to sick call to see if there was any other way for the problem to be corrected. *Id.* It was apparently during one of these visits that a captain assigned to sick call told appellant that he would face a court-martial if he did not have the operation.

However, there is nothing in the record to suggest that the operation was ever formally scheduled or that Curci's flight on December 24, 1946 was to avoid the immediate spectre of a surgeon's scalpel. Indeed, in the staff judge advocate's review of the court-martial, it was commented that "the only apparent motive for the absence charged, in this case, was an alleged fear on the part of the accused because of a *prospective* operation or punishment for failure to submit to the operation". (31a, emphasis added). Since a duress defense requires that the act, here the flight, result from coercion which is present, imminent and impending, and of such a nature as to induce a well grounded fear of death or serious bodily injury, it would clearly be unavailable on the facts of this case.

Moreover, to assert the defense, one must show that he had no reasonable opportunity to avoid committing the act without subjecting himself to the threatened danger. Here, the captain who presented Curci with the "Hobson's choice" of court-martial or operation was assigned to the sick call. There is no indication that Curci ever conferred with his unit commander or any other officer to corroborate what this captain had told him, as he had ample opportunity to do. Clearly appellant had the option to question the authority of the sick call captain without fleeing or subjecting himself to immediate surgery or court-martial.

Thus, upon the facts contained in the record herein, the complete defense of duress would not have been available to Curci and his counsel's failure to argue it, if such is the case, cannot fairly be characterized as erroneous.

The many cases involving ineffective assistance of counsel, cited by appellant for purposes of analogy, require no discussion here. Each turns upon the peculiar facts contained therein, and to distinguish each would shed no light upon the law or the facts herein. What is clear though, with respect to the body of cases on ineffective assistance of counsel, is the recognition of the courts that Monday-morning-quarterbacks can always formulate winning plays with more consistency than can players dusty from the scrimmage. In *Rickenbacker v. Warden, Auburn Correctional Facility, supra*, 550 F.2d at 66, this Court stated:

The courts cannot guarantee errorless counsel or counsel who cannot be made to seem ineffective by hindsight. The fact that 'the case could have been better tried' is not sufficient to sustain appellant's claim. *United States v. Katz*, 425 F.2d at 931.

Upon the record of trial herein, it can more than fairly be inferred that counsel ably represented his client, and indeed, he was ultimately successful in having Curci convicted only of simple AWOL and not desertion. That different strategies may now seem preferable 30 years after the fact cannot support Curci's claim that he suffered from ineffective representation at the court-martial.

CONCLUSION

The decision of the court below should be affirmed, with costs.

Dated: Brooklyn, New York
December 9, 1977

Respectfully submitted,

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MARY MCGOWAN DAVIS,
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STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Diane R. Eisner

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 12th day of December 19 77 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Frederick A Johnson, Esq. Frederic J. Gross, Esq.

Woolworth Bldg. Rm. 1701 6727 Popular Ave.

233 Broadway, N.Y., N.Y. Takama Park, Maryland

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Diane R. Eisner

Sworn to before me this

12th day of December 19 77

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979